UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JULIE ELLEN OLDHAM,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of Social Security,

Defendant.

Case No. C12-167-JCC-BAT

REPORT AND RECOMMENDATION

Julie Ellen Oldham seeks review of the denial of her applications for Supplemental Security Income ("SSI") and Disability Insurance Benefits ("DIB"). She contends that the ALJ erred by: (1) failing to identify all of her severe impairments at step two, (2) improperly assessing her residual functional capacity, (3) failing to consider all of the relevant evidence, and (4) improperly finding she could perform her past relevant work at step four. Dkt. 16 at 1. For the reasons set forth below, the Court recommends that the Commissioner's decision be **REVERSED** and **REMANDED** for further administrative proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

Julie Ellen Oldham was born in 1959 and was 51 years old at the time of the second hearing before the ALJ. Tr. 427. She has a high school education, and previously worked as a

home health aide, housekeeper, and receptionist. Tr. 124, 439-40. On June 27, 2006, she applied for benefits, alleging disability beginning September 22, 2005. Tr. 84-95.

Ms. Oldham's applications were denied initially and on reconsideration. Tr. 47-55. She requested a hearing which took place on December 16, 2008. Tr. 22-42. On January 28, 2009, the ALJ issued a decision finding Ms. Oldham not disabled. Tr. 11-21. The Appeals Council denied Ms. Oldham's request for review, Tr. 1-3, and she filed a complaint in the United States District Court for the Western District of Washington. On October 28, 2009, the Court issued an Order remanding for further administrative proceedings pursuant to the parties' stipulated motion. *Oldham v. Astrue*, No. 09-794-MJP (W.D. Wash. 2009); Tr. 477-78.

Ms. Oldham filed a subsequent application for SSI on February 19, 2009. Tr. 549-55. Her application was denied initially and on reconsideration, and she timely filed a request for a hearing on October 29, 2009. Tr. 487. On August 6, 2010, the ALJ deemed the subsequent application duplicative, consolidated it with the claim remanded by the District Court, and dismissed her request for hearing. *Id*.

On August 17, 2010, the ALJ held another hearing. Tr. 436-58. On October 7, 2010, the ALJ issued a decision finding Ms. Oldham not disabled. Tr. 418-29. The Appeals Council denied Ms. Oldham's request for review, Tr. 918-20, making the ALJ's ruling the final decision of the Commissioner. On January 30, 2012, Ms. Oldham timely filed the present action challenging the Commissioner's decision. Dkt. 1.

II. THE ALJ'S DECISION

Utilizing the five-step disability evaluation process, [1] the ALJ made the following findings:

[1] 20 C.F.R. §§ 404.1520, 416.920.

Step one: Ms. Oldham has not engaged in substantial gainful activity since September 22, 2005, the alleged onset date. Tr. 421.

Step two: Ms. Oldham has the following severe impairments: patellofemoral pain syndrome and bilateral degenerative joint disease. *Id*.

Step three: These impairments do not meet or equal the requirements of a listed impairment.[2] Tr. 424.

Residual Functional Capacity: Ms. Oldham has the residual functional capacity to perform light work, except she is able to frequently engage in balancing, stooping, kneeling, crouching, and crawling; she is able to climb ramps and stairs occasionally; and she must avoid climbing ladders, ropes, and scaffolding. Tr. 424-25.

Step four: Ms. Oldham is capable of performing her past work as a receptionist. Tr. 426.

Step five: Ms. Oldham is capable of performing other jobs existing in significant numbers in the national economy and, therefore, is not disabled. Tr. 427.

III. DISCUSSION

A. Identification of Severe Impairments at Step Two

Ms. Oldham argues that the ALJ failed to properly consider all of her severe impairments at step two. Dkt. 16 at 15. She contends that the medical evidence shows that her shoulder tendinitis and abdominal adhesions are severe impairments.

At step two, a claimant must make a threshold showing that her medically determinable impairments significantly limit her ability to perform basic work activities. *See Bowen v. Yuckert*, 482 U.S. 137, 145 (1987); 20 C.F.R. §§ 404.1520(c), 416.920(c). "Basic work activities" refers to "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§ 404.1521(b), 416.921(b). "An impairment or combination of impairments can be found 'not severe' only if the evidence establishes a slight abnormality that has 'no more than a minimal effect on an individual's ability to work.'" *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996)

[2] 20 C.F.R. Part 404, Subpart P. Appendix 1.

(quoting Social Security Ruling ("SSR") 85-28). "[T]he step-two inquiry is a de minimis screening device to dispose of groundless claims." *Id*. (citing *Bowen*, 482 U.S. at 153-54).

In the present case, the record shows that plaintiff presented to the emergency department on January 22, 2007, after she slipped on some icy steps and landed on her left shoulder and upper arm. Tr. 229. X-rays obtained showed "no abnormalities other than a possible calcific tendinitis." Tr. 230. Ms. Oldham was diagnosed with contusion, sprain, and calcific tendinitis of the left shoulder. *Id*. She was given a sling, but advised against prolonged use of it, and prescribed Vicodin and cyclobenzaprine. *Id*.

Ms. Oldham followed up with her primary care physician, Denis Foster, M.D., on January 30, 2007. Tr. 277, 291-93. Dr. Foster noted that Ms. Oldham has had mild symptoms in both shoulders for years prior to her injury. Tr. 277. On examination of her left shoulder, he found decreased range of motion and muscle strength, positive bicep groove pain, subacromial space tenderness, and crepitus. Tr. 291-92. He diagnosed tendinitis and calcific shoulder and prescribed cyclobenzaprine and a cortisone injection. Tr. 292.

On September 19, 2007, Ms. Oldham presented to Dr. Foster with right shoulder pain. Tr. 257-60. She reported that her shoulder pain had improved following the cortisone injection in January, but had worsened recently. *Id*. She indicated that she performs range of motion exercises daily, but cannot use the shoulder for prolonged periods of time at any tasks, and that using a mouse is painful. Tr. 257. The physical examination showed that she could not internally rotate her arm behind her back, external rotation was 0 degrees, and she had moderate tenderness over the biceps tendon. Tr. 259. Dr. Foster opined, "I think the combination of her knee pain and shoulder pain continue to keep her totally disabled. It may be possible to improve shoulder pain with steroid injection." *Id*.

On December 2, 2008, Ms. Oldham again complained of shoulder pain which was worse when she did heavy housework and better when she did less. Tr. 761. Dr. Foster recommended anti-inflammatory medication, ice, and massage. Tr. 764. He opined that an injection could be needed, and that there could be a component of neck degenerative disc disease. *Id.*

The ALJ considered Ms. Oldham's shoulder tendinitis but found, in view of the medical record, this impairment was not severe. Tr. 17, 422. The ALJ noted that Ms. Oldham's shoulder complaints were inconsistent and her recent complaints appeared to be caused by overexertion. Tr. 422. The ALJ pointed out that Ms. Oldham mentioned shoulder pain only sporadically, noting that she failed to mention any shoulder pain during her June 2008 and April 2009 office visits. *Id.* The ALJ also referred to his prior decision in which he stated that "[d]espite continued normal exam findings, the claimant continued to receive periodic cortisone injections, which Dr. Foster opined should 'clear' the claimant's symptoms." Tr. 17. The ALJ concluded Ms. Oldham's shoulder complaints did not constitute a severe impairment. Tr. 17, 422.

Ms. Oldham argues that the ALJ misstated Dr. Foster's treatment notes. Dkt. 16 at 15. She notes that Dr. Foster stated that "[i]t *may* be possible to improve shoulder pain with steroid injection," Tr. 259, not that it should "clear" her symptoms as the ALJ stated. She also points out that Dr. Foster's 2007 treatment notes indicate she was unable to rotate her arm behind her back, external rotation was 0 degrees, and she had moderate tenderness over the biceps tendon. Tr. 259.

The Court agrees that the ALJ misstated Dr. Foster's opinion. Nevertheless, substantial evidence supports the ALJ's finding that Ms. Oldham's shoulder tendinitis was not severe. As the Commissioner argues, Dr. Foster stated, "I think the combination of her knee pain and shoulder pain continue to keep her totally disabled," but it "may be possible to improve shoulder

pain with steroid injection." Tr. 259. Ms. Oldham was treated with a cortisone injection and was directed to call if her symptoms did not clear within ten days. Tr. 257-58. There is no record that Ms. Oldham followed up. Aside from the four treatment notes summarized above, there is no record that Ms. Oldham's shoulder condition was more than transient or caused any significant vocational limitations.

Even assuming the ALJ erred in neglecting to list her shoulder impairment at step two, plaintiff does not succeed in showing that such error was harmful. *See Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (finding any error in failing to include a condition at step two is harmless if the ALJ considered any limitations posed by the condition at step four). Contrary to Ms. Oldham's claim, the ALJ considered Dr. Foster's opinion that the combination of her knee pain and shoulder pain "continue to keep her totally disabled," and expressly rejected it. Tr. 19. The ALJ noted that Ms. Oldham received relatively little treatment other than occasional cortisone injections. Again, aside from the four treatment notes summarized above, there is no record that Ms. Oldham's shoulder condition was more than transient or caused any vocational limitations. Contradictions between a doctor's assessment of a claimant's abilities and the doctor's treatment notes "is a clear and convincing reason for not relying on the doctor's opinions." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005) (finding discrepancy between a doctor's assessment of limitations and the doctor's treatment notes is a clear and convincing reason to reject the opinion). Plaintiff argues that she testified arm pain likely from her shoulder injury limited her ability to keyboard or write more than 15 minutes and grip items. However, Ms. Oldham has not contested the adverse credibility finding, so her own symptom testimony cannot bolster her argument. In sum, substantial evidence supports the ALJ's finding that Ms. Oldham's shoulder condition is not a severe impairment.

With regards to her abdominal adhesions, the ALJ stated in the first decision,

> The claimant also mentioned abdominal adhesions, though there is scant reference to such in the record. In a clinical note regarding surgery to remove her ovarian cyst, there was reference to "multiple lower abdominal abscesses and then four major surgeries and two minor surgeries related to that." [Tr. 388]. However, there is no indication that such surgeries were performed after the alleged onset date. While there was a reference in the ovarian cyst removal surgery report noting the continued existence of such adhesions, there is no evidence that they caused any limitations. [Tr. 390]. Thus, the abdominal adhesions also do not constitute a severe impairment.

Tr. 17.

In the second decision, the ALJ stated,

> The records show that she had sudden abdominal pain after eating dinner in September 2009. She went to the emergency room. She underwent exploratory laparotomy to treat a partial small bowel obstruction. [Tr. 598-730]. In October 2009, she reported that she "moved her bowels and felt great." Her pain was under control. [Tr.656]. She then underwent several additional procedures related to abdominal abscesses over the next several weeks. Provider Paul Fredette, MD, explained that her small bowel resection went smoothly but that she had an interabdominal abscess stemming from the resection. By December 2009, Dr. Fredette stated that she was doing "very well" and that she had only "some" discomfort over the incision site, and in February 2010, Dr. Foster wrote that her obstruction was "clearing" and that the claimant was not taking antibiotic. [Tr. 667, 886]. There is little or no mention of the bowel resection or related treatments after February 2010.

Tr. 424. The ALJ questioned whether the abdominal adhesions noted in the first decision and the new bowel obstruction were a part of the same underlying problem. *Id*. The ALJ found that even if these two problems were connected, "the evidence establishes that the underlying problem became limiting in September 2009 and resolved shortly after February 2010." *Id*. The ALJ concluded that Ms. Oldham's abdominal condition did not significantly affect her ability to perform work related activities for a period longer than 12 months and, therefore, was not a severe impairment. *Id.*

Ms. Oldham avers that the record reflects that she suffers from abdominal adhesions and

ongoing stomach problems. She contends that these conditions should have been found severe at step two. However, a diagnosis alone is not sufficient to establish a severe impairment. Instead, the claimant must show that her medically determinable impairments are severe. 20 C.F.R. §§ 404.1520(c), 416.920(c). Although Ms. Oldham argues that the evidence supports a conclusion that these conditions are severe impairments, it is not the function of this Court to consider whether there is substantial evidence to support her theory of the case, but rather whether substantial evidence supports the ALJ's finding. *See Flaten v. Sec. of Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995) ("The scope of our review, however, is limited: we may set aside a denial of benefits only if it is not supported by substantial evidence or if it is based on legal error."). As the Commissioner argues, Ms. Oldham has not contested the ALJ's adverse credibility finding, so her own symptom testimony cannot bolster her argument.

Based upon the record, the Court finds substantial evidence supports the ALJ's finding that Ms. Oldham's abdominal adhesions and stomach problems were non-severe impairments. As indicated above, the medical evidence clearly showed the presence of abdominal adhesions, but there was no evidence they caused any limitations. Tr. 390, 794. As the Commissioner argues, Ms. Oldham reported having abdominal pain in September 2009, she underwent a small bowel resection and there was little mention of abdominal symptoms after February 2010. Dkt. 20 at 6. Substantial evidence supports the ALJ's step two finding that Ms. Oldham's abdominal condition did not significantly affect her ability to perform work related activities for a period longer than 12 months and, therefore, was not a severe impairment. *See* 42 U.S.C. § 423 (d)(1)(A) (the term "disability" means "the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . which has lasted or can be expected to last for a continuous period of not less than 12 months.").

Ms. Oldham asserts that even if the abdominal adhesions are not the source of her pain, the ALJ erred in failing to find her multiple episodes of cholecystitis severe. Dkt. 16 at 18. She points to treatment notes from provider Diane Arvin, M.D., who noted that Ms. Oldham was hospitalized in June 2007 for right upper quadrant pain. Tr. 233. However, the ALJ specifically addressed this condition, noting that the abdominal ultrasound performed the night of her admission showed only "minimal sludge within the gallbladder neck, no convincing evidence of cholecystitis or biliary obstruction." Tr. 233, 423. Likewise, a CT scan showed "no evidence of acute abnormality in the abdomen or pelvis." Tr. 233. Treating provider, Deborah McClary, M.D., stated that she may have "'passed' some sludge matter but stated the findings were very 'soft' and not clearly indicative of a gallbladder pathology." Tr. 423. Dr. McClary indicated she had the option to remove her gallbladder. *Id*. Ms. Oldham's pain resolved and she was released from the hospital the next day. Tr. 233-34. The ALJ found there was insufficient evidence to establish a medically determinable impairment, "especially where the record contains little follow up treatment for any possible gallbladder problem." Tr. 423. The ALJ concluded that even if it was a medically determinable impairment there was no evidence that it caused any physical limitations and, therefore, was not severe. Substantial evidence supports the ALJ's decision.

Ms. Oldham also asserts that the ALJ failed to consider that Dr. Foster indicated she "'experiences tingling down spine occasionally and arm tingling[,]' as well as peripheral edema." Dkt. 16 at 19. However, Ms. Oldham does not explain this assertion. The Court need not address an alleged error that is not argued with any specificity in the party's briefing. *Carmickle v. Comm'r, Soc. Sec. Admin*., 533 F.3d 1155, 1161 n. 2 (9th Cir. 2008). Ms. Oldham has not established error in the ALJ's consideration of her impairments at step two.

B. The ALJ's residual functional capacity assessment

At step four, the ALJ must identify the claimant's functional limitations or restrictions and assess the claimant's work related abilities on a function-by-function basis, including a required narrative discussion. *See* 20 C.F.R. §§ 404.1545, 416.945; SSR 96-8p. Residual functional capacity ("RFC") is the most a claimant can do considering his or her limitations or restrictions. *See* SSR 96-8p. The ALJ must consider the limiting effects of all of the claimant's impairments, including those that are not severe, in determining RFC. 20 C.F.R. §§ 404.1545, 416.945; SSR 96-8p.

In this case, the State agency medical consultant, Alfred Dickson, M.D., opined that Ms. Oldham had the RFC for light work with additional postural limitations of occasionally climbing ramps and stairs; never climbing ladders, ropes, and scaffolds; and frequently stooping, kneeling, crouching, and crawling. Tr. 192-93. The ALJ adopted this opinion in the first decision, finding it was consistent with the record as a whole, and specifically with the opinion of treating orthopedist, Patrick M. Lyons, M.D., who also opined that Ms. Oldham had postural limitations. Tr. 19. The ALJ concluded that Ms. Oldham had the RFC to perform the full range of light work, but did not include any of the postural limitations articulated in Dr. Dickson's opinion. Tr. 18-20. On remand, the ALJ was instructed to "(1) reevaluate the claimant's residual functional capacity, taking into account all of her severe and non-severe impairments and the medical opinions of record; (2) obtain additional medical evidence if warranted; and (3) complete the sequential evaluation process." Tr. 477, 481. In his second decision, the ALJ found Ms. Oldham had the RFC to perform light work with the additional postural limitations identified by Dr. Dickson. Tr. 424-25. He found no other limitations or restrictions. Tr. 425.

Ms. Oldham argues that the ALJ failed to comply with the Court's remand order. Dkt.

She contends that the ALJ believed that the only error with his prior RFC assessment was that he failed to include all of the postural limitations articulated in the State agency medical consultant's opinion he purportedly relied upon. She asserts that the ALJ also erred in failing to incorporate all of the limitations identified by Dr. Lyons, which the ALJ adopted as consistent with Dr. Dickson's opinion. Tr. 20.

On December 29, 2006, Dr. Lyons examined Ms. Oldham and completed a WorkFirst assessment (signed on January 9, 2007), which indicated that Ms. Oldham was capable of light work, including the ability to sit, stand, or walk through a six-hour workday. Tr. 220-21. However, Dr. Lyons opined that Ms. Oldham is unable to repetitively use her feet and legs ("raising, pushing, i.e., operate foot controls") for more than one hour, or to frequently stoop. *Id.*

The ALJ specifically noted these limitations in his first decision, yet found this opinion was consistent with Dr. Dickson's opinion. Tr. 20. Ms. Oldham asserts the ALJ's RFC assessment is not supported by substantial evidence as it is contrary to the opinions he purportedly relied upon. She contends that Dr. Lyons's opinion that she cannot stoop, Tr. 220, is inconsistent with Dr. Dickson's opinion that she can stoop frequently, Tr. 193. In addition, she contends Dr. Lyons's opinion that she is limited in using her feet and legs, Tr. 220, is inconsistent with Dr. Dickson's opinion that she is unlimited in her ability to push or pull with her lower extremities, including the operation of foot controls. Tr. 220. An RFC that fails to take into account a claimant's limitations is erroneous. *See Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009).

The Commissioner concedes that the ALJ did not incorporate all of Dr. Lyons's limitations into the RFC, but argues that the ALJ reasonably concluded "that they were consistent with the State agency nonexamining consultative physician, Alfred Dickson, M.D.,

and with the full range of light work." Dkt. 20 at 9. However, as Ms. Oldham points out, to be capable of performing a full range of light work, a claimant must have the ability to stand and walk for six hours of an 8-hour workday, and must be able to push and pull leg controls. *See* 20 C.F.R. §§ 404.1567(b), 416.967(b); SSR 83-10. Thus, the Commissioner's contention that the ALJ reasonably accounted for Dr. Lyons's limitations is not persuasive.

The Commissioner further contends that the ALJ properly gave more weight to the opinion of Dr. Dickson because his opinion was more consistent with the overall record. Dkt. 20 at 10. He asserts that any discrepancies between the postural limitations opined by Dr. Dickson and Dr. Lyons were accounted for. Although the ALJ acknowledged Dr. Lyons's opinion, the ALJ failed to address it further and implicitly rejected it without explanation, given the RFC assessment. The Commissioner's argument is, therefore, an improper post hoc rationalization the Court cannot rely upon. *See Bray v. Comm'r, Soc. Sec. Admin.*, 554 F.3d 1219, 1225-26 (9th Cir. 2009) (holding the Court cannot affirm based on reasoning the ALJ did not discuss). The Court is thus left with a record that shows the ALJ, without explanation, failed to include all of Ms. Oldham's limitations into the RFC.

Ms. Oldham also argues that the ALJ failed to address a December 2006 treatment note in which Dr. Lyons stated, "I think she could probably work in some form of light-duty that would not involve squatting, stooping, crawling, climbing, or prolonged standing or walking." Tr. 213. The Commissioner asserts that the ALJ need not discuss all evidence presented, but need only explain why "significant probative evidence has been rejected." *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984). Here, however, this evidence is significant because a claimant must have the ability to stand and walk for six hours out of an 8-hour workday to be capable of performing a full range of light work. *See* 20 C.F.R. §§ 404.1567(b), 416.967(b);

SSR 83-10. In addition, this evidence is significant because it is inconsistent with Dr. Dickson's opinion that Ms. Oldham could frequently crawl, occasionally climb ramps and stairs, and stand and/or walk six hours in an 8-hour workday. Tr. 192-93. While the Commissioner asserts Dr. Lyons's opinions were equivocal, the Court reviews the ALJ's decision "based on the reasoning and factual findings offered by the ALJ — not post hoc rationalizations that attempt to intuit what the adjudicator may have been thinking." *Bray*, 554 F.3d at 1225.

Ms. Oldham also argues that the ALJ failed to address an October 2005 WorkFirst assessment in which Dr. Lyons opined that she cannot perform frequent stooping or bending, operate foot controls with her left foot, or stand more than 30 minutes in six-hour workday. Tr. 227. The Court agrees this evidence is also significant and probative and should be addressed on remand.

In sum, the ALJ erred in making a RFC assessment that conflicted with opinions by Dr. Lyons without explaining why his opinions were not adopted. Although the Commissioner attempted to explain why Dr. Lyons's opinions were not relevant, the Court concludes that the ALJ's finding that Dr. Lyons's opinions were consistent with Dr. Dickson's opinions is not based on substantial evidence in the record as a whole for the reasons stated above. The ALJ also failed to discuss significant probative evidence contained in the December 2006 and October 2005 records. These errors are not harmless as they effect the propriety of the ALJ's assessment of Ms. Oldham's RFC. Therefore, this matter should be reversed and remanded for further proceedings.

Ms. Oldham also argues the ALJ should have accepted the opinions of Dr. Foster. Dkt. 16 at 23. On September 26, 2005 and March 21, 2006, Dr. Foster filled out WorkFirst assessments in which he opined that, due to arthritis and patellofemoral pain syndrome, Ms.

Oldham was limited to sedentary work, including lifting no more than 10 pounds, walking no more than three hours, and standing no more than one hour. Tr. 224-25.

The ALJ rejected Dr. Foster's opinion that Ms. Oldham was limited to sedentary work, finding them not persuasive given the "fairly benign" examinations in the record. Tr. 20, 245-340, 422 (incorporating Findings of Fact nos. 3 and 5 from the January 2009 decision by reference to the extent it is consistent with the later decision). Clinical notes on the same day of his most recent assessment show that Ms. Oldham's knee was mildly warm to touch with mild effusion, her knee had free range of motion from 100 to full extension, there was no laxity, and mild joint line tenderness. Tr. 299. Dr. Foster also indicated that she walked one and a half miles for exercise three days per week. Tr. 298. Contradictions between a doctor's assessment of a claimant's abilities and the doctor's clinical notes and observations is a clear and convincing reason for not relying on the doctor's opinion. *Bayliss*, 427 F.3d at 1216).

The ALJ also noted that "[g]iven the lack of objective evidence to substantiate [his] opinion, it must have been based on the claimant's subjective complaints, which are subject to significant credibility issues . . . . For example, Dr. Foster opined that the claimant's chronic knee pain would eventually require a knee arthroplasty, as the claimant told Dr. Foster that this was the opinion of the orthopedic surgeon; however, at each visit, Dr. Lyons opined that there was no surgical correction for her complaints, recommended conservative care, and concluded that the claimant was able to work light duty." Tr. 20. Ms. Oldham points out, however, she accurately reported to Dr. Foster that Dr. Lyons opined that she was not a surgical candidate. Tr. 276. The Court agrees this was not a clear and convincing reason for not relying on Dr. Foster's opinion as the record does not support the ALJ's conclusion. Given the existence of other valid reasons for the ALJ's decision, however, this error can be deemed harmless. *Carmickle*, 533

F.3d at 1162-63. The Court concludes the ALJ provided clear and convincing reasons for rejecting Dr. Foster's opinion.

Ms. Oldham also argues that the ALJ failed to give clear and convincing reasons to reject Dr. Foster's 2007 opinion that "the combination of her knee pain and shoulder pain continue to keep her totally disabled." Dkt. 16 at 23. However, as discussed above, the ALJ considered Dr. Foster's 2007 opinion and properly rejected it because there was no evidence that Ms. Oldham's shoulder condition was more than transient or caused any significant vocational limitations. Dr. Foster stated, "I think the combination of her knee pain and shoulder pain continue to keep her totally disabled," but it "may be possible to improve shoulder pain with steroid injection." Tr. 259. Ms. Oldham was treated with a cortisone injection and was directed to call if her symptoms did not clear within ten days. Tr. 257-58. There is no record that Ms. Oldham followed up. Contradictions between a doctor's assessment of a claimant's abilities and the doctor's treatment notes "is a clear and convincing reason for not relying on the doctor's opinions." *Bayliss*, 427 F.3d at 1216. Substantial evidence supports the ALJ's conclusion.

Finally, Ms. Oldham argues that the ALJ failed to consider her obesity when determining her RFC. Dkt. 16 at 21. Ms. Oldham, however, failed to suggest any obesity-related functional limitations the ALJ failed to consider. *See Burch v. Barnhart*, 400 F.3d 676, 684 (9th Cir. 2005). Although Ms. Oldham's treating physicians were aware of her obesity, they did not identify any functional limitations the ALJ did not consider. The ALJ did not err.

C. The ALJ's step four determination

Ms. Oldham contends the ALJ erred in determining she had past relevant work as a receptionist because she only worked part-time, 20 hours per week, for six months, rather than a year as the ALJ stated. Dkt. 16 at 13-14; Tr. 427. The Commissioner responds that substantial

gainful activity may consist of work activity that was performed on a part-time basis. Dkt. 20 at 17. The Commissioner further asserts that any error was harmless because the ALJ also performed an alternative step five analysis and found Ms. Oldham disabled under the Medical-Vocational Guidelines. The Court need not resolve these contentions as the ALJ erred in evaluating the opinions of Dr. Lyons and must necessarily reevaluate on remand what impact, if any, this has on Ms. Oldham's RFC, and steps four and five.

D. The ALJ's and the Appeals Council's duty to develop the record

Ms. Oldham contends that the ALJ and the Appeals Council failed to properly develop the record. Dkt. 16 at 6-13. She asserts that although the ALJ purported to consolidate her February 2009 disability application, the ALJ actually failed to include all of the documents, notices, and evidence related to the subsequent application into the record. Dkt. 16 at 6. She further asserts that the record the ALJ compiled for the 2010 hearing fails to contain any evidence that a qualified State agency medical consultant reviewed the medical evidence submitted with the request for reconsideration. Dkt. 16 at 7-9. Ms. Oldham also contends that the Appeals Council failed to correct the ALJ's error by failing to consolidate the February 2009 application into the record, and by failing to include in the record evidence she submitted to the Appeals Council after the ALJ's October 7, 2010, decision. Dkt. 16 at 11.

As this matter should be remanded for further proceedings, the Court need not resolve these claims. On remand, the ALJ should further develop the medical evidence as necessary.

E. Remand for benefits or further proceedings

The Court may remand for an award of benefits where "the record has been fully developed and further administrative proceedings would serve no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002). This occurs when: (1) the ALJ has failed to

provide legally sufficient reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled if he considered the claimant's evidence. *Id*. at 1076–77.

Here, there are outstanding issues that must be resolved. As indicated above, the effect of Ms. Oldham's knee impairment on her residual functional capacity is unresolved and Dr. Lyons's opinion must be reassessed. Therefore, remand is appropriate in order to allow the Commissioner the opportunity to consider the medical evidence as a whole and to incorporate the properly considered medical evidence into the consideration of plaintiff's RFC.

IV. CONCLUSION

For the foregoing reasons, the Court recommends that the Commissioner's decision be **REVERSED** and the case be **REMANDED** for further administrative proceedings. On remand, the ALJ should utilize the five step disability evaluation process and (1) further develop the medical evidence as necessary, (2) reevaluate the opinions of Dr. Lyons, (3) reevaluate Ms. Oldham's RFC, and (4) reassess steps four and five of the sequential evaluation process with the assistance of a vocational expert if deemed appropriate. A proposed order accompanies this Report and Recommendation.

Objections, if any, to this Report and Recommendation must be filed and served no later than **September 19, 2012.** If no objections are filed, the matter will be ready for the Court's consideration on **September 21, 2012**. If objections are filed, any response is due within 14 days after being served with the objections. A party filing an objection must note the matter for the Court's consideration 14 days from the date the objection is filed and served. Objections and responses shall not exceed twelve pages. The failure to timely object may affect the right to

appeal.

DATED this 5th day of September, 2012.

BRIAN A. TSUCHIDA
United States Magistrate Judge